Supreme Court, U.S.
FILED
APR 13 2004
OFFICE OF THE CLERK

No. 03-1435

In The

Supreme Court of the United States

LAS VEGAS SANDS, INC.,
a Nevada corporation,

Petitioner,

v.

CULINARY WORKERS UNION, Local 226,
an unincorporated association,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID N. FREDERICK
Counsel of Record
G. LANCE COBURN
LIONEL SAWYER & COLLINS
300 So. Fourth Street #1700
Las Vegas, Nevada 89101
(702) 383-8888

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. QUESTIONS PRESENTED WITH RESPECT TO THE FIRST AMENDMENT AND THE *NOERR-PENNINGTON* DOCTRINE

A. Is a labor union's lobbying of local governmental bodies responsible for individual land-use permitting decisions absolutely privileged, even if the union seeks to induce the governmental bodies to explicitly or implicitly condition their approval of a major development project on the landowner reaching agreement with the union, thereby violating federal labor law?

B. Must a plaintiff alleging a claim for money damages that implicates the First Amendment satisfy more specific pleading requirements not set forth in the Federal Rules of Civil Procedure?

II. QUESTIONS PRESENTED WITH RESPECT TO FEDERAL LABOR AND ARBITRATION LAW

A. Can a labor union compel arbitration of an implied covenant of good faith and fair dealing claim arising from a dispute that is expressly exempted from the arbitration clause of the parties' agreement, on the grounds a party's right to arbitration is determined by the nature of an implied covenant claim, rather than the parties' factual allegations with respect to the nature of their dispute?

QUESTIONS PRESENTED – Continued

B. Can a labor union compel arbitration where the parties' agreement only provides for arbitration of grievances not resolved by a board of adjustment and the union never filed a grievance at all, so that compelling arbitration after the union has bypassed the grievance procedure (and sought to prevail in court) would exclude the board of adjustment from the contractually agreed upon dispute resolution process?

CORPORATE DISCLOSURE STATEMENT

Petitioner Las Vegas Sands, Inc. ("LVSI") is not publicly owned, has no parent corporations and there is no publicly-held corporation which owns ten percent (10%) or more of its stock. Las Vegas Sands, Inc. does have publicly-traded debt.

TABLE OF CONTENTS

	Page
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY AND RULE PROVISIONS INVOLVED IN THIS PETITION	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	9
I. THE COURT SHOULD GRANT THE WRIT WITH RESPECT TO THE FIRST AMENDMENT AND *NOERR-PENNINGTON* ISSUES PRESENTED	14
A. The Court Should Eliminate The Confusion Among The Lower Courts On The *Noerr-Pennington* Doctrine And The Requirements For Satisfying The Sham Exception Thereto Outside The Litigation Context	14
B. The Court Should Resolve The Question Of Whether Claims Implicating The First Amendment Must Satisfy More Specific Pleading Requirements Not Set Forth In The Federal Rules Of Civil Procedure	20
II. THE COURT SHOULD GRANT THE WRIT WITH RESPECT TO THE FEDERAL LABOR AND ARBITRATION LAW ISSUES PRESENTED	23

TABLE OF CONTENTS – Continued

Page

A. The Court Should Resolve The Question Of Whether A Party's Right To Arbitration Is Determined By The Plaintiff's Legal Claim Or By The Nature Of The Dispute And The Terms Of The Parties' Arbitration Agreement 23

B. The Court Should Decide Whether A Party Can Compel Arbitration Despite Bypassing The Grievance Procedure In The Contract And Unsuccessfully Seeking Judicial Relief 25

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

Air Line Pilots Association v. Miller, 523 U.S. 866 (1998) 23

American Locomotive Co. v. Gyro Process Co., 185 F.2d 316 (6th Cir. 1950) 13, 27

AT&T Tech. Inc. v. Communications Workers, 475 U.S. 643 (1986) 23, 25

Bayou Fleet, Inc. v. Alexander, 234 F.3d 852 (5th Cir. 2000), *cert. denied*, 532 U.S. 905 (2001) 18

Bill Johnson's Restaurants, Inc. v. N.L.R.B., 461 U.S. 731 (1983) 14

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) ..... *passim*

Carro Rivera v. Parade of Toys, Inc., 950 F.Supp. 449 (D. P.R. 1996) 13

Cheminor Drugs, Ltd. v. Ethyl Corp., 168 F.3d 119 (3d Cir. 1999), *cert. denied*, 528 U.S. 871 (1999) 14, 19

City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991) 11, 15, 16

Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985) 23

Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc., 365 U.S. 127 (1961) 14, 15

Farmland Dairies v. Milk Drivers & Dairy Employees, 956 F.Supp. 1190 (D. N.J. 1997) 12

First Options of Chicago, Inc. v. Kaplan, 519 U.S. 938 (1995) 23

TABLE OF AUTHORITIES – Continued

Page

Franchise Realty, etc. v. S.F. Loc. Joint Exec. Bd., 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 990 (1977) 11, 21, 22

GMAC Commercial Corp. v. Niagara Mohawk Power Corp., 918 F.2d 19 (2d Cir. 1990) 12

Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608 (1986) 11, 18

Grumhaus v. Comerica Securities, Inc., 223 F.3d 648 (7th Cir. 2000) 13, 27

Harvey v. Joyce, 199 F.3d 790 (5th Cir. 2000) 12

In re Oil Spill By Amoco Cadiz, etc., 659 F.2d 789 (7th Cir. 1981) 12

Israel v. Baxter Laboratories, Inc., 466 F.2d 272 (D.C. Cir. 1972) 10, 19, 20

John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964) 25

Kottle v. Northwest Kidney Centers, 146 F.3d 1056 (9th Cir. 1998) 17, 19, 21

Leatherman v. Tarrant County Narcotics Unit, 507 U.S. 163 (1993) 12, 22

Litton Financial Printing v. N.L.R.B., 501 U.S. 190 (1991) 23

MCI Communications Corp. v. American Tel. & Tel. Co., 462 F.Supp. 1072 (N.D. Ill. 1978) 12

Medtronic AVE, Inc. v. Advanced Cardiovascular Systems, Inc., 247 F.3d 44 (3d Cir. 2001) 12

Miller Brewing Co. v. Fort North Distributing Co., 781 F.2d 494 (5th Cir. 1996) 13, 27

TABLE OF AUTHORITIES – Continued

Page

Mutual Ben. Life Ins. Co. v. Zimmerman, 783 F.Supp. 853 (D. N.J. 1992) 13

Nat. Found. for Cancer Research v. A.G. Edwards & Sons, Inc., 821 F.2d 772 (D.C. Cir. 1987) 13, 27

Potters Medical Center v. City Hospital Ass'n, 800 F.3d 568 (6th Cir. 1986) 19

Powderly v. MetraByte Corp., 866 F.Supp. 39 (D. Mass. 1994) 13

Professional Real Estate Investors, Inc. v. Columbia Pictures, 508 U.S. 49 (1993) 11, 16, 17

Sage Intern., Ltd. v. Cadillac Gage Co., 507 F.Supp. 939 (E.D. Mich. 1981) 11

Skinder-Strauss Associates v. Massachusetts Continuing Legal Educ., 870 F.Supp. 8 (D. Mass. 1994) 11

Southern Systems, Inc. v. Torrid Oven, Ltd., 105 F.Supp.2d 848 (W.D. Tenn. 2000) 13, 27

St. Joseph's Hosp., Inc. v. Hosp. Corp. of America, 795 F.2d 948 (11th Cir. 1986) 10

State of N.Y. v. Oneida Indian Nation of New York, 90 F.3d 58 (2d Cir. 1996) 12

Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960) 23

Swierkiewicz v. Sorema, 534 U.S. 506 (2002) 12, 21

United Indus. Workers v. Kroger Co., 900 F.2d 944 (6th Cir. 1990) 13, 26

United Mine Workers v. Pennington, 381 U.S. 657 (1965) 14

TABLE OF AUTHORITIES – Continued

Page

Van Ness Townhouses v. MAR Industries Corp., 862 F.2d 754 (9th Cir. 1988) 26

Video Intern. Production v. Warner-Amex Cable Com., 858 F.2d 1075 (5th Cir. 1988) 14

Whelan v. Abell, 48 F.3d 1247 (D.C. Cir. 1995) 10

Woods Exploration & Prod. Co. v. Aluminum Co. of Am., 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) 10, 19

CONSTITUTION

U.S. Const. amend. I ..... *passim*

STATUTES AND RULES

Federal Arbitration Act, 9 U.S.C. § 4 2

9 U.S.C. § 16 1

Labor Management Relations Act, 29 U.S.C. § 185 1

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 1

28 U.S.C. § 1292(b) 1, 6, 7, 8

28 U.S.C. § 1331 1

28 U.S.C. § 1367 1

Supreme Court Rule 13 2

Fed. R. Civ. P. 8 21

Fed. R. Civ. P. 8(a)(2) 3, 12, 22

Fed. R. Civ. P. 9(b) 21, 22

Fed. R. Civ. P. 54(b) 1, 6, 7

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

2 SMOLLA, LAW OF DEFAMATION § 9:109 (2d Ed. 2003) 22

PETITION FOR WRIT OF CERTIORARI

Petitioner LAS VEGAS SANDS, INC. ("LVSI"), respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in the litigation below.

OPINIONS BELOW

The unpublished Memorandum decision of the Ninth Circuit sought to be reviewed is reprinted in the Appendix ("App.") hereto at page App. 1. The unpublished Order of the Ninth Circuit denying rehearing and rehearing en banc is reprinted in the Appendix hereto at page App. 32. The unpublished Order of the United States District Court for the District of Nevada from which the underlying appeal was taken is reprinted in the Appendix hereto at page App. 10.

JURISDICTION

The United States District Court for the District of Nevada had jurisdiction of LVSI's claims under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, the Federal Question statute, 28 U.S.C. § 1331, and the Supplemental Jurisdiction statute, 28 U.S.C. § 1367. The United States Court of Appeals for the Ninth Circuit had jurisdiction to issue the decision sought to be reviewed under 28 U.S.C. § 1291 and Fed. R. Civ. P. 54(b), 9 U.S.C. § 16(a)(1), and 28 U.S.C. § 1292(b). The Ninth Circuit entered the decision and opinion sought to be reviewed on December 3, 2003, and denied LVSI's timely-filed petition for rehearing and suggestion for rehearing en banc on

January 15, 2004. The Court has jurisdiction of this petition under 28 U.S.C. § 1254(1) and the petition is timely under Supreme Court Rule 13.

CONSTITUTIONAL AND STATUTORY AND RULE PROVISIONS INVOLVED IN THIS PETITION

The First Amendment to the Constitution of the United States provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances.

Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, provides, in relevant part, as follows:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . . If the making of the arbitration agreement or the failure, neglect, or

> refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. . . .

Rule 8(a)(2) of the Federal Rules of Civil Procedure provides, in relevant part, as follows:

> A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief, . . .

STATEMENT OF THE CASE

LVSI and the Culinary Union were parties to a collective bargaining agreement that was in effect from June 1, 1994, until May 31, 1997. Section 22.01 of the Agreement provided:

> During the term of this Agreement, neither the Union collectively nor employees individually will engage in any no-work stoppages, picketing, sympathy strikes or any other form of economic action or interference with the Employer's business except as authorized in Sections 22.03 and 22.04.

The Agreement also contained a multi-step grievance resolution procedure that provided for arbitration of grievances not resolved by a board of adjustment. However, disputes regarding any violation or alleged violation of Section 22.01 of the Agreement were expressly excluded from the Agreement's grievance resolution procedure.

LVSI owned and operated the old Sands Hotel and Casino on the Las Vegas Strip and the land upon which it was located. In May 1996, LVSI announced that it was permanently closing the Sands in June of 1996 and demolishing the antiquated facility. LVSI continued to own the property at all times the Agreement was in effect, and during that time initiated plans for developing its property. On June 30, 1997, after the Agreement had terminated, LVSI conveyed the real property to Venetian Casino Resort, LLC ("VCR"). VCR is the owner of the entirely new and different resort hotel facility now on the property and operates the hotel portion of the new facility. LVSI still holds the gaming license and operates the casino at the new facility.

Prompted by the closure of the Sands, the Culinary Union launched a full-scale guerrilla war against LVSI beginning in June, 1996, nearly one full year before the Agreement expired on May 31, 1997. Despite Section 22.01 of the Agreement, the Culinary Union attacked LVSI in letters to investment bankers directly negotiating with LVSI in order to make project financing more expensive. The Culinary Union took credit for pressuring the Rouse Corporation to back out of a business deal with LVSI for developing the shopping area at the new facility. In March of 1997 – during the effective period of the Agreement – the Culinary Union also targeted architects and contractors that were in the process of negotiating with LVSI regarding its plans for developing the property at that time. The Culinary Union also pressured convention planners and organizers to direct business away from LVSI. From the middle of 1996, the Culinary Union kept intense economic pressure on LVSI with respect to its development efforts at that time through venomous anti-LVSI brochures prepared for distribution to both potential

investors and the public, and through intense lobbying of the Clark County Commission and the Nevada Gaming Control Board. Specifically, the Culinary Union repeatedly opposed the licenses, permits and approvals LVSI needed to develop its property at that time, in order to put pressure on LVSI by interfering with its business. *See* App. 12-13.

The Culinary Union staged a demonstration outside the Sands Hotel & Casino while the hotel was still open to the public. Additionally, while the Sands Hotel & Casino was still open, the Culinary Union engaged in a public disinformation campaign designed to garner public sympathy for the Culinary Union and to portray the Sands as a black-hearted employer having no concern for the welfare of its employees. The calculated goal of the Culinary Union's disinformation campaign was to publically embarrass LVSI, delay and increase the expense of its development efforts at that time, and pressure LVSI officials to acquiesce to the demands of the Culinary Union.

Based on this course of conduct, on April 21, 1997 (over a month before the Agreement expired) LVSI filed its Complaint against the Culinary Union for (1) breach of Section 22.01 of the Agreement; (2) breach of the implied covenant of good faith and fair dealing; and (3) tortious interference with prospective economic advantage, due to the Culinary Union's economic action and interference with LVSI's activities. The Culinary Union filed an answer in which it raised the timing requirements of the grievance resolution provisions of the Agreement as an affirmative defense, but neither filed a grievance nor moved to compel arbitration.

Instead, on August 7, 1997, the Culinary Union filed the first of several summary judgment motions, seeking a favorable judicial resolution of each of LVSI's claims. On April 13, 1999 – prior to any discovery as a result of a stipulated stay of discovery while motions were pending – the District Court issued its order denying the Culinary Union's first summary judgment motion, except that the District Court held that the *Noerr-Pennington* doctrine immunized the Culinary Union from any liability on any of LVSI's claims arising from lobbying activities. App. 30-31. After denying a second Culinary Union summary judgment motion, on May 18, 2000, the District Court approved a stipulation to bifurcate the proceedings and allow the parties to seek a judicial determination, based upon a written record, of the Culinary Union's liability to LVSI on its claim for breach of the express terms of the Agreement. The parties submitted trial briefs on a written record. On January 18, 2001, the District Court issued its Partial Judgment in favor of the Culinary Union on LVSI's express contract claim. App. 29.

On March 5, 2001, the Culinary Union filed, *inter alia*, a motion seeking reconsideration of the District Court's previous denials of its summary judgment motions on LVSI's claim for breach of the implied covenant. The parties also sought certification, under FRCP 54(b) and 28 U.S.C. § 1292(b), of the District Court's partial judgment on LVSI's express contract claim and its previous grant of summary judgment under the *Noerr-Pennington* doctrine, as well as certification of the District Court's previous denials of summary judgment on LVSI's implied covenant claim. On April 24, 2001, the District Court denied Culinary's Motion For Reconsideration, and summarily

granted certification of its earlier rulings under FRCP 54(b) and 28 U.S.C. § 1292(b).

The parties appealed, but the Ninth Circuit dismissed both appeals on jurisdictional grounds. Specifically, the Ninth Circuit dismissed the Culinary Union's attempt to appeal the denials of its summary judgment motions on LVSI's implied covenant claim for lack of jurisdiction under the Federal Arbitration Act, because the Culinary Union had not moved to compel arbitration, and merely asserted arbitrability as a defense to LVSI's claim. The Ninth Circuit dismissed LVSI's attempt to appeal the partial judgment for the Culinary Union on LVSI's express contract claim for lack of an adequate Fed. R. Civ. P. 54(b) certification and, in these circumstances, refused to review the District Court's *Noerr-Pennington* ruling, having earlier rejected the parties' Section 1292(b) appeals.

Following remand, the Culinary Union filed, for the first time, a Motion to Compel Arbitration of LVSI's implied covenant claim on April 8, 2002, nearly five (5) years after LVSI had alleged the claim and after the Culinary Union had repeatedly sought summary judgment from the District Court on the claim. On July 3, 2002 the District court entered its Order denying the Culinary Union's motion, expressly finding that LVSI's claim for breach of the covenant of good faith and fair dealing "is not subject to the arbitration clause." App. 10. The District Court also made a legally adequate Fed. R. Civ. P. 54(b) certification of its judgment on LVSI's express contract claim. App. 10-11. Finally, the District Court again granted Section 1292(b) certification of its *Noerr-Pennington* ruling, framing the controlling question of law as:

> Whether, as a matter of law, the Union was entitled to the protection of absolute immunity . . . regarding the lobbying and pressuring activities alleged in the complaint, precluding, as a matter of law, the application of any exception to the *Noerr-Pennington* doctrine?

App. 14. Again, the parties appealed, and this time, the Ninth Circuit accepted the parties' Section 1292(b) appeals.

On December 3, 2003, the Ninth Circuit affirmed the District Court's "summary judgment" on LVSI's express contract claim. App. 3-6. The Ninth Circuit reversed the District Court's denial of the Culinary Union's motion to compel arbitration of LVSI's implied covenant claim on the grounds that "[a]n implied covenant claim necessarily arises from more than a singular contract provision" and "implicates the entire" Agreement, making arbitration "the proper forum for its resolution" because "the parties' dispute clearly involves the proper interpretation of the agreement." (citation omitted) App. 6-7. The Ninth Circuit did not address the Culinary Union's failure to file a grievance and its repeated seeking of judicial relief from the District Court, other than to say "LVSI's waiver argument is unavailing." App. 7-8.

The Ninth Circuit also affirmed the District Court's summary judgment on the *Noerr-Pennington* doctrine, but did not address the District Court's absolute immunity ruling on its merits. Instead, the Ninth Circuit held that LVSI's pleadings, which allege the particular lobbying activities of the Culinary Union, the necessary permits and approvals that the Culinary Union opposed, and that the Culinary Union's opposition was for the wrongful ulterior purpose of interfering with LVSI's business (*see*

App. 12-13), were insufficient to satisfy the heightened pleading requirements the Ninth Circuit had adopted in earlier cases. App. 8-9. Specifically, the Ninth Circuit faulted LVSI for not alleging what information the Culinary Union presented to Clark County commissioners, whether the commissioners rejected LVSI's applications, whether the Culinary Union was alone in opposing the applications, and whether the Culinary Union's grounds for opposing the applications were false or "objectively baseless." App. 9. Finally, the Ninth Circuit asserted that LVSI had conceded *Noerr-Pennington* immunity by acknowledging (during oral argument on another issue) that the Culinary Union, like everyone else, has the right to lobby. App. 9.

LVSI sought rehearing and suggested rehearing en banc but the Ninth Circuit denied such relief in an Order entered January 15, 2004. App. 32-33.

REASONS FOR GRANTING THE WRIT

The District Court and Ninth Circuit decisions below raise serious and troubling issues of widespread importance with respect to (1) the political activities of labor unions and the extent to which unions can use First Amendment rights to secure the assistance of local governmental entities in achieving their organizational, representational and economic objectives, contrary to Federal labor law, and (2) arbitration as a matter of contractural agreement and the extent to which a party can obtain arbitration based upon the nature of the legal claims asserted, rather than the nature of the dispute and the terms of the arbitration agreement. Moreover, the

decisions below conflict with decisions in other circuits, as well as decisions of this Court, not only on the substantive legal principles giving rise to these important issues, but also on recurring procedural questions such as (1) whether plaintiffs alleging particular claims (here, a claim for money damages that implicates the First Amendment) must satisfy more specific pleading requirements not set forth in the Federal Rules of Civil Procedure, and (2) whether a party can compel arbitration after having completely bypassed the grievance procedure specified in the parties' agreement and unsuccessfully sought a favorable decision from the courts, thereby altering the contractually agreed-upon grievance resolution procedure. The Court should grant the writ to resolve these important substantive and procedural issues of significance to a wide spectrum of individuals and for-profit and non-profit entities.

The District Court's ruling that petitioning of legislative, administrative, and other regulatory bodies responsible for individual permitting decisions is absolutely privileged under the *Noerr-Pennington* doctrine conflicts with *Whelan v. Abell*, 48 F.3d 1247, 1254-1255 (D.C. Cir. 1995) (petitioning not protected if it includes "deliberate falsehoods"); *St. Joseph's Hosp., Inc. v. Hosp. Corp. of America*, 795 F.2d 948, 954-955 (11th Cir. 1986) (petitioning not protected if it includes "misrepresentations before a governmental agency . . . passing on specific certificate applications . . ."); *Israel v. Baxter Laboratories, Inc.*, 466 F.2d 272, 276-279 (D.C. Cir. 1972) (petitioning not protected if it includes "actions which impair the fair and impartial functioning of an administrative agency" thereby threatening "the integrity of the regulatory process"); *Woods Exploration & Prod. Co. v. Aluminum Co. of Am.*,

438 F.2d 1286, 1296-1298 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (same), as well as with the Court's decision in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). Furthermore, the litigation below provides the Court with a rare (perhaps unique) opportunity to specify the requirements for satisfying the "sham" exception to the privilege for First Amendment petitioning activities in the legislative and administrative contexts as the Court did for the litigation context in *Professional Real Estate Investors, Inc. v. Columbia Pictures*, 508 U.S. 49 (1993). In *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991), the Court established the applicability of the sham exception to the regulation of land use and development by local legislative bodies, and the circumstances below strongly suggest that the Culinary Union opposed the permits and approvals LVSI needed to develop its property, not because it genuinely sought denial of a project that would employ thousands of potential union members, but to attempt to induce Clark County officials to explicitly or implicitly condition their approval of the project on LVSI reaching agreement with the Culinary Union, thereby violating Federal labor law. *See Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 619 (1986).

The Ninth Circuit's affirmance of the District Court's absolute immunity ruling on the grounds LVSI's pleadings did not satisfy the more specific pleading requirements for claims implicating the First Amendment the Ninth Circuit had established in *Franchise Realty, etc. v. S.F. Loc. Joint Exec. Bd.*, 542 F.2d 1076, 1082-1086 (9th Cir. 1976), *cert. denied*, 430 U.S. 990 (1977), conflicts with *Skinder-Strauss Associates v. Massachusetts Continuing Legal Educ.*, 870 F.Supp. 8, 11 (D. Mass. 1994); *Sage Intern., Ltd. v. Cadillac*

Gage Co., 507 F.Supp. 939, 943-944 (E.D. Mich. 1981); and *MCI Communications Corp. v. American Tel. & Tel. Co.*, 462 F.Supp. 1072, 1102-1104 (N.D. Ill. 1978), as well as with the Court's decisions in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (employment discrimination complaint need not allege specific facts satisfying Second Circuit's heightened pleading standard but need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief" satisfying Fed. R. Civ. P. 8(a)(2)), and *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163 (1993) (Fifth Circuit's heightened pleading standard for civil rights cases alleging municipal liability under § 1983 is inconsistent with the liberal system of notice pleading established by the Federal Rules of Civil Procedure).

The Ninth Circuit's holding that the Culinary's right to compel arbitration of LVSI's implied covenant of good faith and fair dealing claim is determined by the nature of the legal claim asserted rather than the parties' factual allegations regarding their dispute and the terms of their arbitration agreement, conflicts with *State of N.Y. v. Oneida Indian Nation of New York*, 90 F.3d 58, 60-61 (2d Cir. 1996); *Medtronic AVE, Inc. v. Advanced Cardiovascular Systems, Inc.*, 247 F.3d 44, 54-55 (3d Cir. 2001); *Harvey v. Joyce*, 199 F.3d 790, 794-795 (5th Cir. 2000); *In re Oil Spill By Amoco Cadiz, etc.*, 659 F.2d 789, 794 (7th Cir. 1981); and *Farmland Dairies v. Milk Drivers & Dairy Employees*, 956 F.Supp. 1190, 1202-1203 (D. N.J. 1997). Moreover, the Ninth Circuit's reversal of the District Court's refusal to compel arbitration of LVSI's good faith and fair dealing claim arising from a dispute that is outside the terms of the parties' arbitration agreement conflicts with *GMAC Commercial Corp. v. Niagara Mohawk Power Corp.*,

918 F.2d 19 (2d Cir. 1990); *Carro Rivera v. Parade of Toys, Inc.*, 950 F.Supp. 449 (D. P.R. 1996); *Powderly v. MetraByte Corp.*, 866 F.Supp. 39, 42-43 (D. Mass. 1994); and *Mutual Ben. Life Ins. Co. v. Zimmerman*, 783 F.Supp. 853, 875 (D. N.J. 1992).

Finally, the Ninth Circuit's holding compelling arbitration of LVSI's implied covenant claim, even though the parties' arbitration agreement only provided for arbitration of grievances not resolved by a board of adjustment and the Culinary Union never filed a grievance at all, thereby completely excluding the board of adjustment from the dispute resolution process, conflicts with the Sixth Circuit's decision in *United Indus. Workers v. Kroger Co.*, 900 F.2d 944, 947 (6th Cir. 1990) (failure to file grievance is substantive omission precluding court from compelling arbitration, not a procedural question to be left to the arbitrator). Moreover, by characterizing this issue as whether the union "waived" arbitration but not addressing the Ninth Circuit's judicial standards for resolving that issue where the party seeking arbitration has litigated the claim in court, the Ninth Circuit's decision below conflicts with numerous decisions in other circuits enunciating a variety of judicial standards for determining whether a party waives arbitration by seeking a favorable resolution of the matter from the courts. *See, e.g. Grumhaus v. Comerica Securities, Inc.*, 223 F.3d 648, 650-653 (7th Cir. 2000); *Nat. Found. for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772 (D.C. Cir. 1987); *Miller Brewing Co. v. Fort North Distributing Co.*, 781 F.2d 494, 496-498 (5th Cir. 1996); *American Locomotive Co. v. Gyro Process Co.*, 185 F.2d 316 (6th Cir. 1950); *see also, Southern*

Systems, Inc. v. Torrid Oven, Ltd., 105 F.Supp.2d 848 (W.D. Tenn. 2000) (summarizing caselaw in the various circuits).

I. THE COURT SHOULD GRANT THE WRIT WITH RESPECT TO THE FIRST AMENDMENT AND *NOERR-PENNINGTON* ISSUES PRESENTED

A. The Court Should Eliminate The Confusion Among The Lower Courts On The *Noerr-Pennington* Doctrine And The Requirements For Satisfying The Sham Exception Thereto Outside The Litigation Context

The First Amendment to the United States Constitution guarantees the people's right to petition their governments for a redress of grievances. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), the Court established what has come to be called the *Noerr-Pennington* doctrine, holding that parties are immune from liability for petitioning activities that genuinely seek favorable governmental action from the legislative and/or executive branches of government.[1]

---

[1] *Noerr* and *Pennington* established such immunity under the antitrust laws. Subsequently, however, both this Court and the lower Federal courts, recognizing the First Amendment underpinnings of the doctrine, have extended such protection to other legal contexts. *See, e.g., Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 741 (1983) (federal labor laws); *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 128-129 (3d Cir. 1999) (and cases cited therein), *cert. denied*, 528 U.S. 871 (1999) (state common-law tort claims, including tortious interference claims); *Video Intern. Production v. Warner-Amex Cable Com.*, 858 F.2d 1075, 1084 (5th Cir. 1988) (same). No issue is presented in the

(Continued on following page)

Noerr itself recognizes, however, that immunity is properly withheld where petitioning activity "ostensibly directed toward influencing governmental action is a mere sham to cover . . . an attempt to interfere directly with the business relationships" of an adversary. 365 U.S. at 144.

In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), the Court extended the doctrine to petitioning activities directed to administrative and judicial governmental bodies. In doing so, the Court held that sham petitioning includes the use of administrative and judicial proceedings to deny adverse parties "meaningful access" to such tribunals and filing "proceedings and actions . . . with or without probable cause, and regardless of the merit of the case." 404 U.S. at 511-512. The Court also held that, at least "in the setting of the adjudicatory process," immunity could be denied for perjury of witnesses, use of a patent obtained by fraud, bribery of a public official and/or "many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes," including "a pattern of baseless, repetitive claims . . . which leads the fact finder to conclude that the administrative and judicial processes have been abused." 404 U.S. at 512-513.

In *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 379-384 (1991), the Court addressed the sham exception in the context of a city council's adoption of zoning ordinances, saying:

---

litigation below with respect to the facial applicability of the *Noerr-Pennington* doctrine to the claims brought by LVSI.

> The "sham" exception to *Noerr* encompasses situations in which persons use the governmental *process* – as opposed to the *outcome* of that process – as an anticompetitive weapon. A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay . . . A "sham" situation involves a defendant whose activities are "not genuinely aimed at procuring favorable government action" at all, . . . not one "who 'genuinely seeks to achieve his governmental result, but does so *through improper means*,'" . . .

499 U.S. at 380 (internal citations omitted; emphasis in original).

Then in *Professional Real Estate Investors, Inc. v. Columbia Pictures*, 508 U.S. 49 (1993), the Court established a two-part test for the sham exception in the litigation context, saying:

> First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, . . . Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals "an attempt to interfere *directly* with the business relationships of a competitor," . . . through the "use [of] the governmental *process* – as opposed to the *outcome* of that process – as an anticompetitive weapon," . . .

508 U.S. at 60-61 (footnote and internal citations omitted; emphasis and brackets in original). Thus, in the litigation context, the Court has identified two aspects of its "objectively baseless" requirement: (1) whether the "challenged litigation is objectively meritless," and (2) whether "an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome." *Id.* Recognizing that, in the adjudicatory context, a favorable outcome is presumed to depend upon the objective merit of the claim or defense, the Court then combined these two aspects into a single requirement, holding that "sham litigation must constitute the pursuit of claims so baseless that no reasonable litigant could realistically expect to secure favorable relief." 508 U.S. at 62.

Outside the adjudicatory context, however, these two factors (i.e., objective merit and realistic expectation of success) cannot be equated. As the Ninth Circuit observed in *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056, 1061 (9th Cir. 1998), in the legislative context "it would seem quite pointless to ask whether the lobbying effort was 'objectively baseless,'" because "we would need objective standards, of which there are few, if any, in the political realm of legislation against which to measure the defendant's conduct." *Id.* However, the lack of objective standards outside the adjudicatory context need *not* mean that petitioning activity is absolutely privileged, as the District Court held below (citing *Kottle*). In *California Motor Transport*, the Court observed that: "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' . . . which the legislature has the power to control. . . . If the end result is unlawful, it matters not that the means used in violation may be lawful." 404 U.S. at 515 (internal citation omitted).

The litigation below provides the Court with a rare and perhaps unique opportunity to explore this variant of the sham exception in the legislative, administrative and regulatory contexts. The circumstances strongly suggest – at least in the absence of discovery -- both the requisite subjective intent on the part of the Culinary Union to injure LVSI through the governmental process itself, rather than the outcome of that process, and an "objective" component provided by the Culinary Union's attempt to induce Clark County to violate Federal labor law by conditioning its approval of the project on LVSI reaching agreement with the Culinary Union, thereby making the Culinary Union's petitioning activity a misuse of its First Amendment lobbying rights under *California Motor Transport*.[2]

There is widespread confusion among the lower courts on the requirements for satisfying the sham exception to the *Noerr-Pennington* doctrine outside the litigation context. For example, in *Bayou Fleet, Inc. v. Alexander*,

---

[2] Specifically, it is hard to believe the Culinary Union's opposition to the licenses, permits and approvals LVSI needed to develop its property at that time was motivated by a "genuine" desire to induce Clark County to deny permission to build a major hotel resort complex that would employ thousands of potential union members. Rather, the circumstances strongly suggest that the Culinary Union hoped to use its considerable political clout in Southern Nevada to induce Clark County officials to explicitly or implicitly condition their approval of the project on LVSI reaching agreement with the Culinary Union. Should discovery confirm this was, in fact, the Culinary Union's real objective, and had that effort succeeded, its petitioning activity would have induced Clark County to violate legal restrictions local governments are powerless to alter, since Federal labor law prohibits local municipalities from conditioning permit approvals on the applicant reaching agreement with its union adversaries. *See Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 619 (1986).

234 F.3d 852, 861-862 (5th Cir. 2000), *cert. denied*, 532 U.S. 905 (2001), the Fifth Circuit pointed to the one aspect of the "objectively baseless" requirement the Court established for the litigation context in *Professional Real Estate Investors* that arguably might be applicable outside that context, and framed the relevant inquiry as whether "the evidence shows that a reasonable private citizen could expect to secure favorable government action." *Id.*

On the other hand, in the *Whelan* and *St. Joseph Hospital* cases cited above, the D.C. and Eleventh Circuits respectively held that the use of misrepresentations (*St. Joseph's Hospital*) and deliberate falsehoods (*Whelan*) is sufficient to satisfy the sham exception in the regulatory context. *See also, Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 123 (3d Cir. 1999), *cert. denied*, 528 U.S. 871 (1999) (misrepresentations that "infect the core of [the petitioner's] claim and the government's resulting actions" sufficient); *Potters Medical Center v. City Hospital Ass'n*, 800 F.3d 568, 571 (6th Cir. 1986) ("the knowing and willful submission of false facts to a government agency falls within the sham exception . . ."). In *Kottle*, the Ninth Circuit held that the court must first determine whether the individual permitting process is more akin to political or adjudicative decisionmaking and if the latter, then the sham exception is satisfied by (1) a single objectively baseless proceeding brought to interfere with the plaintiff's business relationships; (2) a series of proceedings brought without regard to their merit to injure an adversary; or (3) intentional misrepresentations that deprive the proceeding of its legitimacy. 146 F.3d at 1060-1062.

Finally, in the *Israel* and *Woods Exploration* cases cited above, the D.C. and Fifth Circuits respectively viewed the specific instances of wrongful conduct referenced by the

Court in *California Motor Transport* as illustrative and not determinative of the many forms of "illegal and reprehensible practice which may corrupt the administrative" as well as the judicial processes, 404 U.S. at 512-513, and framed the relevant inquiry in more general terms as whether the petitioning included "actions which impair the fair and impartial functioning of an administrative agency," thereby threatening "the integrity of the regulatory process." 466 F.2d at 278-279. Thus, the sham exception would be satisfied in the circumstances below, should discovery confirm that the Culinary Union sought to injure LVSI through the governmental process itself, not the outcome of that process, by attempting to induce Clark County to violate Federal labor law by explicitly or implicitly conditioning its approval of the project on LVSI reaching agreement with the Culinary Union, thereby tainting the fair and impartial decisionmaking process.

The Court should grant the writ to resolve the wide-ranging and conflicting views among the lower courts on the requirements for satisfying the sham exception to the *Noerr-Pennington* doctrine in the legislative, administrative and regulatory contexts.

B. The Court Should Resolve The Question Of Whether Claims Implicating The First Amendment Must Satisfy More Specific Pleading Requirements Not Set Forth In The Federal Rules Of Civil Procedure

The Ninth Circuit did not address the District Court's absolute immunity ruling. Instead, the Ninth Circuit affirmed the District Court's summary judgment precluding LVSI from pursuing its claims based on the Culinary

Union's petitioning activities without any discovery having been conducted, on the grounds that LVSI's pleadings did not satisfy the more specific pleading requirements for claims implicating the First Amendment that the Ninth Circuit first established in *Franchise Realty, etc. v. S.F. Loc. Joint Exec. Bd.*, 542 F.2d 1076, 1082-1086 (9th Cir. 1976), *cert. denied*, 430 U.S. 990 (1977), and reaffirmed in *Kottle*, 146 F.3d at 1063-1064.

In *Franchise Realty*, the Ninth Circuit asserted that a more specific pleading requirement is necessary for claims implicating the First Amendment in order to avoid chilling the exercise of First Amendment rights with vexatious litigation. 542 F.2d at 1082-1086. Twice the Court has granted certiorari and reversed circuit court decisions imposing heightened pleading requirements not found in the Federal Rules of Civil Procedure on comparable public policy grounds, as the sole issue addressed by the Court.

In *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), the Court recognized that requiring a plaintiff to allege specific facts that would establish a *prima facie* case could result in dismissal of meritorious claims since discovery might uncover evidence (unknown to the plaintiff when the complaint was filed) that would satisfy the plaintiff's proof requirements. 534 U.S. at 511-512. Consequently, the Court then held that, regardless of the merits of the public policy arguments urged in support of a heightened pleading requirement for claims other than those addressed in Fed. R. Civ. P. 9(b), such a requirement would conflict with the simplified notice pleading standard reflected in Fed. R. Civ. P. 8, making such a heightened pleading requirement an inappropriate basis upon which to dispose of questionable claims. 534 U.S. at 512-515.

In *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163 (1993), the Court held that requiring that a plaintiff plead the particular factual details providing the basis for a claim not covered by Fed. R. Civ. P. 9(b), conflicts with Fed. R. Civ. P. 8(a)(2), which only requires "a short and plain statement of the claim showing that the pleader is entitled to relief." The Court then held that, if there are other cases for which the added specificity requirement of Fed. R. Civ. P. 9(b) would be appropriate, that result "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation," referencing summary judgment and control of discovery as proper ways "to weed out unmeritorious claims sooner rather than later." 507 U.S. at 167-169.

The Court should grant the writ to resolve the question whether the public policy considerations cited by the Ninth Circuit in *Franchise Realty* are sufficient to justify a heightened pleading requirement not set forth in the Federal Rules for claims implicating the First Amendment in light of the alternative mechanisms devised by other courts and legislatures for quickly disposing of so-called SLAPP (Strategic Lawsuits Against Public Participation) lawsuits that have no merit. *See* 2 SMOLLA, LAW OF DEFAMATION § 9:109 (2d Ed. 2003), pp 9-110 to 9-113.

II. THE COURT SHOULD GRANT THE WRIT WITH RESPECT TO THE FEDERAL LABOR AND ARBITRATION LAW ISSUES PRESENTED

A. The Court Should Resolve The Question Of Whether A Party's Right To Arbitration Is Determined By The Plaintiff's Legal Claim Or By The Nature Of The Dispute And The Terms Of The Parties' Arbitration Agreement

The Court has repeatedly held that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Air Line Pilots Association v. Miller*, 523 U.S. 866, 876 (1998); *AT&T Tech. Inc. v. Communications Workers*, 475 U.S. 643, 648 (1986); *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960). Thus, in *First Options of Chicago, Inc. v. Kaplan*, 519 U.S. 938, 943 (1995), the Court observed that "arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration." 514 U.S. at 942. In *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985), the Court held that a party can compel arbitration of arbitrable claims that are "intertwined" with nonarbitrable claims. However, the Court emphasized that the "preeminent concern" of Congress in enacting the Federal Arbitration Act was to enforce private agreements to arbitrate, not to promote arbitration. Hence, the Court did not hold that a party can compel arbitration of any claim ("intertwined" or not) arising out of a dispute that the parties have expressly exempted from their arbitration agreement.

The Ninth Circuit took an entirely different view of the basis for the Culinary Union's right to compel arbitration of LVSI's implied covenant claim, however. The Ninth Circuit concluded that LVSI's implied covenant claim implicated the entire collective bargaining agreement and the Culinary Union could compel arbitration of that claim because it required interpretation of the agreement. The Court expressly rejected that argument in *Litton Financial Printing v. N.L.R.B.*, 501 U.S. 190, 208-209 (1991), saying:

> [W]e must determine whether the parties agreed to arbitrate the dispute, and we cannot avoid that duty because it requires us to interpret a provision of a bargaining agreement.

Id. (internal citation omitted). Thus, the Ninth Circuit's holding that a party's right to compel arbitration of a good faith and fair dealing claim is determined by the nature of the legal claim asserted, rather than by the factual allegations giving rise to the dispute and the terms of the parties' arbitration agreement, conflicts with several decisions of this Court, as well as the numerous decisions in other circuits cited above.

Furthermore, the Ninth Circuit's approach would radically alter the dispute resolution process. Parties could no longer control whether a particular dispute would be resolved by arbitration or by adjudication through the express terms of their contracts, since a party's right to arbitration would depend upon the nature of the legal claims brought. Hence, "a party could frustrate any agreement to arbitrate simply by the manner in which it framed its claims." *In re Oil Spill by Amoco Cadiz, etc.*, 659 F.2d 789, 794 (7th Cir. 1981). Arbitration would no longer be a matter of contract, but rather a matter of the

plaintiff's choice. The Court should grant the writ to resolve the question of whether a party's right to arbitration is determined by the nature of the legal claims or by the nature of the dispute and the terms of the parties' arbitration agreement.

B. The Court Should Decide Whether A Party Can Compel Arbitration Despite Bypassing The Grievance Procedure In The Contract And Unsuccessfully Seeking Judicial Relief

In *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), the Court first held that "whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the [c]ourt on the basis of the contract entered into by the parties." 376 U.S. at 546-547 (citations and internal quotation marks omitted). However, the Court then held that "[o]nce it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator," including whether arbitration is precluded by the failure to follow the initial steps of a multi-step grievance procedure under which arbitration is not reached until the last step. 376 U.S. at 555-559. Subsequently, however, in *AT&T Tech, Inc. v. Communicative Workers, supra*, the Court held that the "question of arbitrability – whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance – is undeniably an issue for judicial interpretation." 475 U.S. at 649.

Thus, in *United Indus. Workers v. Kroger Co.*, 900 F.2d 944, 947 (6th Cir. 1990), the Sixth Circuit held that:

> Procedural questions of whether steps of a grievance procedure have been followed are generally left to the arbitrator. *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1960). Substantive questions of whether an arbitrable grievance has been filed at all, however, are for the courts to decide. *See AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986).

Id. This is particularly true for collective bargaining agreements such as the one below, under which only some disputes and not others are subject to the grievance procedure and only grievances not resolved by a board of adjustment are subject to arbitration. In these circumstances, the Ninth Circuit's decision compelling arbitration without the Culinary Union having filed a grievance at all works a substantive revision of the grievance procedure agreed upon by the parties, by completely eliminating the board of adjustment from the dispute resolution process. *See id.*, 900 F.2d at 947 ("Federal labor policy is that grievance procedures are integral parts of collective bargaining agreements.").

The Ninth Circuit's decision does not address the contractural basis for the Culinary Union's right to compel arbitration after having not filed a grievance at all and unsuccessfully sought a favorable judicial decision from the courts. Instead, the Ninth Circuit summarily rejects "LVSI's waiver argument," but does not even address its judicial standards for determining whether a party has waived a right to compel arbitration by litigating the claim in court for years before moving to compel arbitration. *See Van Ness Townhouses v. MAR Industries Corp.*, 862 F.2d

754, 758-759 (9th Cir. 1988). As a result, the Ninth Circuit's decision in the litigation below conflicts with numerous decisions in other circuits establishing and enforcing a variety of tests for determining when a party has waived arbitration by litigating the matter on its merits. *Compare, e.g., Grumhaus v. Comerica Securities, Inc.*, 223 F.3d 648 (7th Cir. 2000) (presumption of waiver from choice of judicial forum and prejudice not required) and *Nat. Found. for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772 (D.C. Cir. 1987) (waiver determined by whether, under totality of circumstances, party seeking arbitration has acted inconsistently with right to arbitration), with *Miller Brewing Co. v. Fort North Distributing Co.*, 781 F.2d 494, 496-498 (5th Cir. 1986) ("Waiver will be found when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party.") (footnote omitted) and *American Locomotive Co. v. Gyro Process Co.*, 185 F.2d 316 (6th Cir. 1950) (arbitration waived by filing answer raising arbitration as an affirmative defense but not seeking arbitration until after having actively litigated the case for years); *see also, Southern Systems, Inc. v. Torrid Oven Ltd.*, 105 F.Supp.2d 848 (W.D. Tenn. 2000) (summarizing caselaw in the various circuits).

The Court should grant the writ to resolve the question whether a party can compel arbitration after having completely bypassed the contractually agreed-upon dispute resolution process and affirmatively sought a favorable judicial resolution of the claim from the courts.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

DAVID N. FREDERICK
Counsel of Record
G. LANCE COBURN
LIONEL SAWYER & COLLINS
300 So. Fourth Street #1700
Las Vegas, Nevada 89101
(702) 383-8888

Attorneys for Petitioner

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAS VEGAS SANDS, INC, a Nevada Corporation, Plaintiff-Appellee, v. CULINARY WORKERS UNION LOCAL #226, an unincorporated association, Defendant-Appellant.	No. 02-16381 D.C. No. CV-97-00467-PMP MEMORANDUM*
LAS VEGAS SANDS, INC, a Nevada Corporation, Plaintiff-Appellant, v. CULINARY WORKERS UNION LOCAL #226, an unincorporated association, Defendant-Appellee.	No. 02-16384 D.C. No. CV-97-00467-PMP

(Filed Dec. 3, 2003)

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

LAS VEGAS SANDS, INC, a Nevada Corporation, Plaintiff-Appellant, v. CULINARY WORKERS UNION LOCAL #226, an unincorporated association, Defendant-Appellee.	No. 03-15125 D.C. No. CV-97-00467-PRP/RLH

Appeal from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge, Presiding

Argued and Submitted November 4, 2003
San Francisco, California

Before: THOMPSON, TROTT, and CALLAHAN, Circuit Judges.

Culinary Workers Union Local #226 ("Culinary") appeals the district court's order denying its motion to compel arbitration of a claim filed against it by Las Vegas Sands, Inc. ("LVSI") for breach of implied covenant of good faith and fair dealing. LVSI cross-appeals the district court's summary judgment dismissing its claim for breach of contract and its claim for tortious interference with economic advantage, to the extent that tort claim is predicated upon Culinary's lobbying activities. We have jurisdiction over these consolidated appeals under 28 U.S.C. § 1292(b). We reverse the district court's denial of Culinary's motion to compel arbitration of the implied covenant claim, and we affirm the district court's dismissal of LVSI's other claims.

I.

We first address a portion of LVSI's cross-appeal: the district court's grant of summary judgment on the breach of contract claim. We review de novo the district court's construction and interpretation of the collective bargaining agreement ("CBA"). *See Carpenters Health and Welfare Trust Fund v. Bla-Delco Constr. Inc.*, 8 F.3d 1365, 1367 (9th Cir. 1993).

Section 22.01 of the CBA prohibits Culinary from interfering with the "Employer's business." The district court interpreted the "Employer's business" to mean the Sands Hotel Casino ("the Sands"). It also determined that Culinary's campaign was directed only against the Venetian. We agree.

The first relevant document pertaining to the interpretation of the phrase "Employer's business" is the Memorandum of Agreement amending the prior CBA and extending the term through May 1997. In that Memorandum, the "Employer" is defined as "Las Vegas Sands, Inc. d/b/a Sands Hotel Casino." The designation "d/b/a" (or "doing business as") is a descriptive term identifying the *business* of LVSI. If LVSI operated several businesses, those other businesses would not have been included under the d/b/a Sands Hotel designation. The d/b/a designation limits the meaning of Employer to LVSI in its capacity as owner and operator of the Sands.

Next, § 4.01 of the CBA authorizes Culinary's representatives to enter the "Employer's establishment" to communicate with its members about union business. The section goes on to state that "[s]uch visits shall not interfere with the conduct of the Employer's business. . . . " This section is useful because, like § 22.01, it uses the

term "Employer's business." The "business" here clearly means operation of the Sands.

Perhaps most significant is § 28.01 of the CBA, which is read together with an appended Side Letter Agreement. Section 28.01 broadly defines the term "Employer" to include subsidiaries and other entities under LVSI's control. The Side Letter Agreement establishes a "procedure . . . to avoid picketing and/or other economic action directed at the Employer in the event the Union decides to conduct an organizing campaign at any operation (at which the Union does not have representation rights) covered by Section 28.01. . . . "

Taken by itself, § 28.01 might suggest that the parties intended the "Employer" (and thus the "Employer's business") to encompass a broad scope. However, read together with the Side Letter Agreement, it becomes clear that the relevant provisions of § 22.01 pertain only to interference with the Sands. Otherwise, the Side Letter Agreement's prohibition of picketing and other economic activity at *other* Employer facilities would be superfluous.

LVSI argues that the Side Letter Agreement is not probative because it established a procedure for an organizational card check campaign, a circumstance not addressed by § 22.01. However, the Side Letter Agreement explicitly states that among its purposes is "to *avoid picketing and/or other economic action* directed at the Employer in the event the Union decides to conduct an organizing campaign . . . " (emphasis added). Since picketing was already prohibited by § 22.01 (regardless of Culinary's motive), the Side Letter Agreement necessarily suggests that Culinary could otherwise have picketed at establishments other than the Sands.

While the district court relied on the above provisions, other instances in the CBA of the term "Employer's business" confirm the district court's interpretation. For example, § 23.01 provides that "[t]he right to manage the *Employer's business* and the direction of its employees . . . are reserved to the Employer" (emphasis added). Examples of the Employer's business include "the right to direct, plan and control operations, to determine the number of employees to be employed, and to determine the means, methods and schedules of operations." This suggests "business" means hotel and casino operation, not real estate development. Similarly, § 28.01 requires the Employer to give advance notice and to honor its payment obligations "[i]n the event the Employer sells or assigns its business." The sale of unrelated businesses by LVSI would clearly not trigger the notice and payment requirement here. As in § 22.01, the parties did not deem it necessary to specify which "business" because LVSI had only one business covered by the CBA – the Sands.

The district court also determined that extrinsic evidence weighed in favor of its interpretation. LVSI contends that the use of extrinsic evidence by the district court was improper. Generally, Nevada's parol evidence rule bars the use of extrinsic evidence when the terms of a contract are unambiguous. *Crow-Spieker No. 23 v. Robinson,* 629 P.2d 1198, 1199 (Nev. 1981). We need not determine whether use of extrinsic evidence was proper here because the same interpretation would obtain even without the introduction of parol evidence.

LVSI further argues that even if "Employer's business" means the Sands, Culinary interfered with the Sands itself. LVSI's argument is unconvincing because all of the union's activities were directed against the

Venetian, not the Sands. LVSI cites letters sent to potential investors and customers that specifically named the Sands. The earliest of these letters, however, was sent after the Sands announced its closure and only six days before the Sands shut its doors. Other letters were sent after the Sands was demolished and its business ceased to exist. The references in these letters to the "Sands Hotel" served merely to identify the yet-unnamed resort and yet-unknown owner in Culinary's campaign against the Venetian.

Accordingly, we conclude that "Employer's business" as used in § 22.01 of the CBA refers only to the Sands, and that Culinary did not violate this provision in its campaign against the Venetian. We therefore affirm the district court's summary judgment in favor of Culinary on this issue.

II.

We next turn to Culinary's appeal of the district court's denial of its motion to compel arbitration. We review de novo the district court's determination of the scope of an arbitration clause and its denial of a motion to compel arbitration. *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1169 (9th Cir. 2003); *Moore v. Local 569 of Int'l Bhd. of Elec. Workers*, 53 F.3d 1054, 1055 (9th Cir. 1995). The CBA specifically exempts "[a]ny violation or alleged violation of Section 22.01" from arbitration. The district court held that LVSI's claim for breach of the implied covenant of good faith and fair dealing is exempt from arbitration because it is encompassed by § 22.01. We disagree.

An implied covenant claim necessarily arises from more than a singular contract provision. In *Teamsters Local 216 v. Granite Rock,* 851 F.2d 1190, 1193 (9th Cir. 1988), *cert. denied* 488 U.S. 986 (1988), we held that an implied covenant claim was subject to a CBA arbitration clause "[b]ecause the parties' dispute clearly involves the proper interpretation of the agreement[.]" Issues such as the nature of the contractual relationship and what the parties expected from one another as fair treatment are relevant to this inquiry. Because the implied covenant claim implicates the entire CBA, arbitration is the proper forum for its resolution. The fact that the implied covenant claim is related to the § 22.01 claim does not preclude its arbitrability. The Supreme Court rejected the so-called "intertwinement" doctrine in *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 221-24 (1985).

Moreover, "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582-583 (1960). The only non-arbitrable claim under the CBA is for "violation or alleged violation of Section 22.01." This does not preclude arbitration of the breach of implied covenant claim.

LVSI also argues that Culinary waived its right to arbitration because it did not first invoke the Grievance and Arbitration Procedure described in the CBA. We disagree. "[T]he question of arbitrability – whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance – is undeniably an issue for judicial interpretation." *AT&T Techs., Inc.*

v. Communications Workers of Am., 475 U.S. 643, 649 (1986). LVSI's waiver argument is unavailing.

III.

We turn now to LVSI's cross-appeal of the district court's entry of partial summary judgment against it on its tortious interference claim. The district court granted partial summary judgment in favor of Culinary to the extent LVSI's claims were based on Culinary's lobbying activity. Such activity, according to the district court, was immune from civil liability under the *Noerr-Pennington* doctrine.

LVSI argues that *Noerr-Pennington* immunity should not apply to Culinary's lobbying efforts because (1) Culinary's lobbying efforts were a "sham," and (2) Culinary waived its *Noerr-Pennington* immunity by agreeing to § 22.01 of the CBA, the non-interference clause. Because we have decided that § 22.01 precluded campaigning only against the Sands, not against the Venetian, the LVSI's waiver argument fails.

LVSI's sham contention also fails. For a plaintiff to succeed in invoking the sham exception to defeat *Noerr-Pennington* immunity, a plaintiff must plead with specificity the "sham-ful" nature of the alleged interference. "[W]hen a plaintiff seeks damages for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required." *Kottle v. Northwest Kidney Ctrs.*, 146 F.3d 1056, 1063 (9th Cir. 1998), quoting *Franchise Realty Interstate Corp. v. San Francisco*

Local Joint Executive Bd. of Culinary Workers, 542 F.2d 1076, 1083 (9th Cir. 1976).

LVSI's allegations fall short of the required specificity. LVSI alleged that Culinary appeared before the Clark County Board of Commissioners (the "Board") to oppose LVSI's applications for various permits and approvals, but does not specify what information Culinary presented to the Board, whether the Board in fact rejected LVSI's permit applications, whether Culinary was alone in opposing the permit applications, or whether Culinary's grounds for opposing the permit applications were false or "objectively baseless."

At oral argument before this court, LVSI contended that it raised sufficiently specific allegations to invoke the sham exception at the district court's summary judgment hearing. At that hearing, however, LVSI *conceded* that Culinary's lobbying activity would be protected by *Noerr-Pennington;* its argument was that Culinary, in § 22.01 of the CBA, waived its right to lobby. *See* District Court Hearing Transcript of hearing held April 8, 1999, at page 24 ("Our position, as expressed in our brief, I think it's pretty clear is that if they had the right to lobby, *and they did, everybody does,* they waived it, they gave it up as part of the contract. . . . ") (emphasis added). Accordingly, we affirm the district court's grant of partial summary judgment. The appellant and the appellee shall each bear their own costs on appeal.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LAS VEGAS SANDS, INC., a Nevada Corporation, Plaintiff,	)	
v.	)	CASE NO.
CULINARY WORKERS UNION, LOCAL 226, an unincorporated association, Defendant.	)	CV-S-97-00467-PMP-RLH

ORDER

(Filed Jul. 3, 2002)

On April 8, 2002, Defendant Union filed Motions to Compel Arbitration, Issue Rule 54(b) Certification, and Stay Further Proceedings. On April 26, 2002, Plaintiff filed an Opposition to Defendant Union's Motion to Compel Arbitration, and Argument In Support of Rule 54(b) and 28 U.S.C. §1292(b) Certification and Stay of Further Proceedings. On May 1, 2002, Defendant filed a Reply in Support of Motion to Compel Arbitration. Having read and considered the foregoing,

IT IS ORDERED that Defendant's Motion to Compel Arbitration is **denied**. The Court specifically finds that LVSI's claim for breach of the covenant of good faith and fair dealing is not subject to the arbitration clause.

IT IS FURTHER ORDERED that this Court's prior entry of partial judgment on Plaintiff's first cause of action (breach of contract) is hereby certified as a final judgment under Rule 54(b), as there is no just reason for delay in

entering a final judgment with respect to that claim. A copy of this Court's Findings of Fact, Conclusions of Law and Partial Judgment regarding the breach of contract claim is attached as Exhibit 1, and a copy of this Court's entry of Partial Judgment is attached as Exhibit 2 (both dated January 18, 2001). The Court makes this express determination based of a variety of factors, including, but not limited to, the following:

- The case will be more efficiently resolved if there is an immediate appeal from the partial judgment already entered in this case, and a stay pending that appeal. If LVSI is successful on appeal of the partial judgment, the Union has indicated that the case would likely settle. Moreover, the Court finds that an immediate appeal of the partial judgment on LVSI's breach of contract claim and stay pending that appeal substantially reduces the risk of a second trial, which would consume the valuable time and resources of this Court and the parties. *See, e.g., Purdy Mobile Homes v. Champion Home Builders*, 594 F.2d 1313, 1316-17 (9th Cir. 1979).

- Final resolution on appeal of the legal issues involved on LVSI's breach of contract claim will expedite the ultimate termination of this litigation.

- Delay in appellate resolution of the contract interpretation issues involved in LVSI's breach of contract action would mean continuing uncertainty in the activities and bargaining positions taken by the Union, which represents that the other unionized hotels in Las Vegas share identical language in their contracts.

IT IS FURTHER ORDERED that the Court's prior ruling, dated April 14, 1999 (attached as Exhibit 3), granting partial summary judgment in favor of Defendant Culinary

Workers Union, is hereby certified under 28 U.S.C. §1292(b). Specifically, in the order dated April 14, 1999, this Court ruled:

> to the extent Plaintiff's claims are based on lobbying activities by Defendant Culinary Workers Union #226, Summary Judgment is granted in favor of Defendant Culinary Workers Union and against Plaintiff Las Vegas Sands, Inc., in accordance with the *Noerr-Pennington* doctrine. *See Kottle v. Northwest Kidney Centers*, 146 F.3d 1056 (9th Cir. 1998).

With respect to this specific ruling, the Court finds and certifies that: (1) the order involves controlling questions of law; (2) there is substantial ground for difference of opinion on the questions of law; and (3) an immediate appeal from the order may materially advance the ultimate termination of this litigation.

The controlling questions of law arise from the following:

In the complaint, LVSI alleged, in pertinent part, that its initial development of the property on which the Venetian was to sit required LVSI to "obtain certain licenses, permits and approvals from the Clark County Board of Commissioners." LVSI further alleged that "lobbying and political pressure by the Union on the Clark County Board of Commissioners and others [was] undertaken for the wrongful ulterior purpose of interfering with LVSI's business. . . . " LVSI specifically alleged that the Union appeared before the Clark County Board of Commissioners and its subsidiary boards, agency and staff to "oppose, interfere with or delay the granting of necessary

licenses, permits and approvals to LVSI." LVSI further alleged that:

- the Union filed an appeal with the Clark County board of Commissioners challenging the grant of variances and use permits to LVSI;
- the Union pressured the Clark County Board of Commissioners to deny a pre-development agreement needed to expedite development of the property at that time;
- the Union pressured the Clark County Board of Commissioners to not accept the traffic study and plans presented by LVSI for development of the property at that time;
- the Union mailed brochures to voters within the districts represented by two County Commissioners denigrating the traffic study and plans presented by LVSI, seeking to cause the Commissioners to reject the traffic study and plans; and
- the Union improperly lobbied and pressured the Nevada Gaming Control Board to re-examine the status of LVSI's gaming, and that the lobbying and political pressure was undertaken for the ulterior purpose of interfering with LVSI's business.

In its opposition to the Union's first motion for summary judgment, LVSI argued, *inter alia*, that the Union waived any immunity it may have had under the *Noerr-Pennington* doctrine by virtue of § 22.01 in the collective bargaining agreement, which provides:

> During the term of this Agreement, neither the Union collectively nor the employees individually will engage in any no-work stoppages, picketing, sympathy strikes or any other form of economic

> action or interference with the Employer's business except as authorized in Sections 22.03 and 22.04.

Additionally, LVSI argued that the "sham exception" to the *Noerr-Pennington* doctrine applied in this instance. At the hearing on the Union's first motion for summary judgment, which occurred prior to any discovery by the parties, the Union argued that any and all of its lobbying activities described above were subject to the absolute immunity provided by the *Noerr-Pennington* doctrine with respect to lobbying activities, citing *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056 (9th Cir. 1998). In the order dated April 14, 1999, granting partial summary judgment, the Court specifically cited the *Kottle* decision. Thus, the controlling question of law is as follows:

> Whether, as a matter of law, the Union was entitled to the protection of absolute immunity under the *Kottle* decision regarding the lobbying and pressuring activities alleged in the complaint, precluding, as a matter of law, the application of any exception to the *Noerr-Pennington* doctrine?

The Court further observes that there exists a substantial interrelationship between the issues raised by the entry of partial judgment on the breach of contract claim, and the issues raised by this Court's order granting partial summary judgment to the extent any of the claims are based on the Union's "lobbying activities." Due to this overlap of legal issues, the Court observes that it will materially advance this litigation if the anticipated appeals under Rule 54(b) and 28 U.S.C. § 1292(b), including the anticipated Petition for Permission to Appeal under 28

U.S.C. § 1292(b), are considered by the same panel at the Ninth Circuit.

DATED: July 2, 2002

/s/ Philip M. Pro
PHILIP M. PRO
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

LAS VEGAS SANDS, INC., A Nevada corporation, Plaintiff, v. CULINARY WORKERS UNION, LOCAL 226, an unincorporated association, Defendants.	CV-S-97-0467-PMP (RLH) FINDINGS OF FACT CONCLUSIONS OF LAW AND PARTIAL JUDGMENT (Filed Jan. 18, 2001)

On May 18, 2000, this Court approved and entered the Stipulation and Order to Bifurcate Trial and Extend Deadline for Filing Joint Pre-Trial Order (Second Request) ("Stipulation and Order") (Doc. #34) submitted by the Plaintiff, Las Vegas Sands, Inc. ("LVSI") and Defendant, Culinary Workers Union, Local 226 ("Culinary Union"). Under the Stipulation and Order, this Court agreed to consider on a written record the issue of whether Culinary Union is liable for a breach of §22.01 of the Collective Bargaining Agreement between the Parties. The Parties submitted the Stipulation Re: Written Record (Doc. #35) along with Exhibits (Doc. #36-39) on July 12, 2000.

On August 4, 2000, Defendant, Culinary Union filed a Trial Brief (Doc. #42). The Plaintiff, LVSI filed a Trial Brief (Doc. 43) on August 7, 2000. Culinary Union filed a Reply Brief (Doc. #46) on September 7, 2000. LVSI filed a Reply Brief and Objections to Defendant's Proffered Evidence (Doc. #47) on September 7, 2000.

On September 26, 2000, Defendant, Culinary Union filed an Application for Leave to File Supplemental Brief (Doc. #48) and the Supplemental Brief (Doc. #49). LVSI filed a Response to Defendant's Application for Leave to File Supplemental Brief (Doc. #50) on Oct. 12, 2000. Culinary Union filed no Reply. Defendant filed their request for leave to file a Supplemental Brief on the ground that Plaintiff addressed new issues for the first time in its Reply Brief. Plaintiff asserts that it followed the procedures set out in the Stipulation and Order and the Stipulation RE: Written Record for making arguments and offering evidence. Both Parties agreed to provide the Court with a written record, trial briefs and reply briefs. The Parties also agreed that evidentiary objections would be asserted through briefing: "The parties shall specify in their opening briefs the documents and/or testimony upon which they rely. Each party shall, in its reply brief, make all objections to the evidence offered by the other party in its opening brief." (Stipulation Re: Written Record at 7). This Court finds that Plaintiff, LVSI followed the requirements set out in the Stipulation and Order and the Stipulation Re: Written Record. Plaintiff made no new arguments in the Reply Brief. Defendant Culinary Union's Application for Leave to File Supplement Brief will, therefore, be denied.

Based upon the record adduced, the Court hereby enters the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

In accord with the Stipulation and Order (#34), this Court is to determine "whether [Culinary] Union has

liability to LVSI for breach of §22.01 of the Collective Bargaining Agreement." Section 22.01 states:

> During the term of this Agreement, neither the Union collectively nor employees individually will engage in any no-work stoppages, picketing, sympathy strikes or any other form of economic action or interference with the Employer's business except as authorized in Sections 22.03 and 22.04.

(Stipulated R., Ex. 12, 1994 Collective Bargaining Agreement at 44.)

Section 22.01 first appeared in the Collective Bargaining Agreement between LVSI and Culinary Union in 1989. (Stipulated R., Ex. 13, Excerpts from Draft 1989 Collective Bargaining Agreement at 38.) The 1989 Agreement was effective June 2, 1989 through May 31, 1994. (*Id.* at 45.) Section 22.01 was unchanged in the 1994 Collective Bargaining Agreement. (Stipulated R., Ex. 12, 1994 Collective Bargaining Agreement at 44; *see also* Stipulated R., Ex. 15, Memorandum of Agreement.) The 1994 Agreement was in effect from June 1, 1994 through May 31, 1997. (Stipulated R., Ex. 12, 1994 Collective Bargaining Agreement at 52.) No party to the negotiations of the 1989 Agreement or the 1994 Agreement remembers any discussions on the meaning of §22.01 during the negotiations of either agreement. (Stipulated R., Ex. 48, Bonaventure Decl. at ¶3; Stipulated R., Ex. 68, Taylor Dep. at 18; Stipulated R., Ex. 70, Wilhelm Dep. at 9-10; Stipulated R., Ex. 71, Arnold Dep. at 12; Stipulated R., Ex. 80, Champion Aff. at ¶7.)

On May 16, 1996, LVSI announced the closing of the Sands Hotel Casino closed as of June 30, 1996. (Stipulated

R., Ex. 16, Sands Announces Closing at 1.) LVSI stated that the Sands Hotel Casino would be demolished and a new hotel casino, the Venetian would be build. (*Id.*) The Plaintiff and Defendant met to negotiate over jobs and the Union's position at the new Venetian. (Stipulated R., Ex. 67, Friedman Dep. at 46-49). The Parties did not reach an agreement. (Stipulated R., Ex. 68, Taylor Dep. at 22.)

Beginning around the time of the announcement of the closing of the Sands, Culinary Union began sending letters and pamphlets regarding the labor disputes between Culinary Union and LVSI to existing and potential business associates of LVSI and the Venetian. (*See* Stipulated R., Ex. 18-22, 26-32.) Culinary Union continued to send other letters and pamphlets after the expiration of the 1994 Collective Bargaining Agreement on May 31, 1997. (*See* Stipulated R., Ex. 38-39, 41.)

The Sands Hotel Casino was demolished in November 1996. (Defendant's Trial Brief at 3.) LVSI remained the owner of the property where the Sands Hotel Casino had been located until June 30, 1997 when LVSI conveyed the property to Venetian Casino Resort, L.L.C. (Stipulated R., Ex. 49, Friedman Aff. at ¶7.) The new Venetian Hotel Casino opened in 1999. LVSI retained the gaming license and operates the casino in the Venetian. (Stipulated R., Ex. 67, Friedman Dep. at 51; Stipulated R., Ex. 49, Friedman Aff. at ¶9.)

II. CONCLUSIONS OF LAW

The record before the court establishes that Defendant Culinary Union sent letters and pamphlets to the Las Vegas community and to existing and potential business associations of LVSI and the Venetian. These letters and

pamphlets discussed the labor disputes between the Union and LVSI. This Court must determine if any action by Culinary Union against LVSI or the Venetian creates liability under §22.01 of the 1994 Collective Bargaining Agreement. At issue is the meaning of the phrase "any other form of economic action or interference with the Employer's business . . . ," as used in §22.01.

Plaintiff LVSI asserts that the letters and pamphlets constitute economic interference by Culinary Union because the term "employer's business . . . ," as used in §22.01, encompasses all business done by LVSI and not just the Sands Hotel Casino. Defendant Culinary Union argues these letters and pamphlets do not fall under §22.01 because "employer's business" means only LVSI's business as Sands Hotel Casino which closed on June 30, 1996.

In determining the meaning of language in a collective bargaining agreement, Courts look to contract law. At the same time, a collective bargaining agreement is more than a contract. It "is different in nature, scope, and purpose from the ordinary commercial contract. . . . 'It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate.'" *Syufy Enter. v. N. California State Ass'n of IATSE Locals*, 631 F.2d 124, 125-26 (9th Cir. 1980) (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960)). As a result, the context of the history of the negotiations is important to understanding the words of the agreement. *Syufy Enter.*, 631 F.2d at 126 (citing *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 570 (1960) (Brennan, J., concurring)). "[I]f a term [in a collective bargaining agreement] is ambiguous, its interpretation depends on the parties' intent at the time of the

contract's execution . . . in light of earlier negotiations, later conduct, related agreements, and industrywide [sic] custom." *Pierce County Hotel Employees and Rest. Employees Health Trust v. Elks Lodge, B.P.O.E. No. 1450*, 827 F.2d 1324, 1327 (9th Cir. 1987) (citing *Kemmis v. McGoldrick*, 767 F.2d 594, 597 (9th Cir. 1985); *Arizona Laborers, Local 395 Health & Welfare Trust Fund v. Conquer Cartage Co.*, 753 F.2d 1512, 1517-1518 (9th Cir. 1985)). At the same time, if a contract term is unambiguous, the parole evidence rule bars extrinsic evidence. *Pace v. Honolulu Disposal Serv., Inc.*, 227 F.3d 1150, 1157 (9th Cir. 2000).

The meaning of the term "employer's business" in §22.01 of the 1994 Collective Bargaining Agreement must be viewed as a part of the Agreement as a whole. *Mastro Plastics Corp. v. Nat'l Labor Relations Bd*, 350 U.S. 270, 279 (1956) ("Like other contracts, [collective bargaining agreements] must be read as a whole"). Four sections of the 1994 Agreement provide details on the meaning and usage of "employer." The Court finds that a reading of these sections, demonstrates that the meaning of the term "employer's business" is clearly limited to only LVSI's business as the Sands Hotel Casino and not the business of LVSI as a whole. As a result, the phrase is unambiguous within the 1994 Collective Bargaining Agreement.

The opening paragraph of the 1994 Collective Bargaining Agreement provides a definition for "employer," and provides:

> THIS AGREEMENT is made and entered into . . . by and between the LAS VEGAS SANDS,

> INC. dba SANDS HOTEL CASINO (hereinafter, called the "Employer") and its successors and assigns,[1] and the LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, for and on behalf of CULINARY WORKERS UNION, LOCAL NO. 226, and BARTENDERS UNION, LOCAL NO. 165 (hereinafter, called the "Union").

(Stipulated R., Ex. 12, 1994 Collective Bargaining Agreement at 1.) The phrase "dba Sands Hotel Casino" explicitly limits "employer" to only LVSI as the Sands Hotel Casino.

Two sections in the 1994 Agreement show that "employer" can only have the more narrow meaning to include only the Sands Hotel Casino. First, Section 1.01 explains that the Culinary Union along with the Bartenders Union, Local No. 165 would act on behalf of the "Employer's employees at its facility as indicated in the first paragraph of this agreement and excluding any person working for the Employer at any other facility." *Id.* Here, "employer" refers again to the Sands Hotel Casino. Next, Section 4.01 states:

> Authorized representatives of the Union shall be permitted to visit the Employer's establishment for the purpose of communicating with the employees and supervisors regarding Union business and collecting Union dues, assessments and initiation fees. Such visits shall not interfere with the conduct of the Employer's business or

[1] Both Parties concede that the Venetian is not the successor in interest to the Sands Hotel Casino. (Plaintiff's Reply Brief at 13; Defendant's Trial Brief at 3.)

> with the performance of work by employees during their working hours.

(Stipulated R., Ex. 12, 1994 Collective Bargaining Agreement at 5.) If the term were given the broader meaning suggested by LVSI to include LVSI as a whole, then this section would allow Culinary Union to visit employees in any part of the LVSI business. Such a reading does not follow with the meaning of the Collective Bargaining Agreement as a whole.

Finally, §28.01 gives a broader definition of "Employer" which includes LVSI as a whole. This definition, however, applies only to section 28 of the 1994 Agreement:

> the term "Employer" shall be deemed to include any person, firm, partnership, corporation, joint venture or other legal entity substantially under the control of the Employer covered by this Agreement, or one or more principals(s) of the Employer covered by this Agreement, or a subsidiary of the Employer covered by this Agreement, or any person, firm, partnership, corporation, joint venture or other legal entity which substantially controls the Employer covered by this Agreement.

Id. at 49. By providing the broader definition of "employer" for section 28, the 1994 Agreement implies that the narrower meaning of "employer" applies unless otherwise specified.

The Court concludes, therefore, that the term "employer's business" as used in §22.01 refers only to the business of the Sands Hotel Casino, not the business of LVSI as a whole. As a result, any action by Culinary Union against LVSI and not the Sands Hotel Casino does

not fall under §22.01 of the 1994 Collective Bargaining Agreement.

Even if this Court found that the phrase, "employer's business" was ambiguous in §22.01 of the 1994 Collective Bargaining Agreement, an analysis of the extrinsic evidence would also lead to the conclusion that the Agreement only applies to the Sands Hotel Casino. The extrinsic evidence considered by courts in determining the meaning of a collective bargaining agreement include "earlier negotiations, later conduct, related agreements and industrywide [sic] custom." *Pierce County Hotel Employees*, 827 F.2d at 1327.

The record before the Court makes it clear that none of the individuals who negotiated the 1989 Collective Bargaining Agreement or the 1994 Collective Bargaining Agreement remember any discussions on the meaning of §22.01. (Stipulated R., Ex. 48, Bonaventure Decl. at ¶3; Stipulated R., Ex. 68, Taylor Dep. at 18; Stipulated R., Ex. 70, Wilhelm Dep. at 9-10; Stipulated R., Ex. 71, Arnold Dep. at 12; Stipulated R., Ex. 80, Champion Aff. at ¶7.) Thus, no negotiating history is available for use as extrinsic evidence.

Moreover, later conduct by the Parties indicates that §2201 was limited to the Sands Hotel Casino. Bill Champion,[2] a Human Resources Consultant for the Sands

---

[2] Defendant Culinary Union objects to the admissibility of the Affidavit of Bill Champion. (Defendant's Trial Brief at 14.) The Defendant declares the affidavit is inadmissible because of statements about Champion's understanding of the meaning of §22.01 during the 1994 negotiations. (Stipulated R., Ex. 80, Champion Aff. at ¶¶9-10.) If this Court had concluded the phrase "employer's business" was ambiguous,

(Continued on following page)

during the 1994 Collective Bargaining Agreement negotiations stated that his understanding of §22.01 was that the Union could not economically interfere with LVSI. (Stipulated R., Ex. 80, Champion Aff. at ¶¶9-10.) However, Champion also asserts "there was no discussion about [§22.01] during the 1994 negotiations." *Id.* Champion makes it clear that he never discussed the meaning of §22.01 with the Union in order to confirm or qualify his understanding.

While the intent of the parties is important when a term is ambiguous, subsequent conduct of the Plaintiff makes clear the actual meaning applied to the situation. *See Pierce County Hotel Employees*, 827 F.2d at 1327. The conduct by LVSI shows the interpretation advanced by Plaintiff does not match with that expressed by Champion. On June 30, 1996, LVSI closed the Sands Hotel Casino and soon after demolished it to construct the new Venetian resort. (Stipulated R., Ex. 16, Sands Announces Closing at 1.) The Plaintiff's conduct since the closing has been to differentiate between the Sands Hotel Casino and LVSI. In response to an interrogatory asking for reasons why the employees of the Sands were terminated instead of laid off, the Plaintiff's responded: "The Sand's employees were terminated because the Sands Hotel-Casino completely ceased business operations on June 30, 1996." (Stipulated R., Ex. 60, Plaintiff's Responses to Interrogatories at 4.) When Robert Goldstein, President of Venetian Hotel & Casino, was asked about the difference between the Sands Hotel Casino and the Venetian, he stated the two resorts

---

the Court would overrule the objection because extrinsic evidence of a party's understanding is admissible.

were "apples and oranges." (Stipulated R., Ex. 64, Goldstein Dep. at 8.) Finally, Attorney Joni Jacobs, who worked on a Culinary Union grievance against the Sands Hotel Casino was told by a Sands attorney that "the closure of the hotel mooted the case, stating that a new company would be operating the new hotel." (Stipulated R., Ex. 45, Jacobs Decl. at 1-2.) These statements and actions by the Plaintiff establish how LVSI distinguished between the Sands Hotel Casino and LVSI in its dealings with Culinary Union upon the closing of the Sands.

Additionally, a side agreement, the Memorandum of Agreement attached to the 1994 Collective Bargaining Agreement makes more clear the meaning of §22.01. The relevant part of the Memorandum of Agreement states:

> The parties hereby establish the following procedure for the purpose of ensuring an orderly environment for the purpose of ensuring an orderly environment for the exercise by the Employer's employees of their rights . . . to avoid picketing and/or other economic action directed at the Employer in the event the Union decides to conduct an organizing campaign at any operation (at which the Union does not have representation rights) covered by Section 28.01 of the above referenced agreements between the parties. . . .

(Stipulated R., Ex. 12, 1994 Collective Bargaining Agreement at 67.) The Parties clearly agreed that picketing and economic interference was limited to those activities directed at the Sands Hotel Casino and not at other operations of LVSI.

Finally, the industry standard for collective bargaining agreements between other hotel casinos and union calls for a narrow reading of the clause at §22.01.[3] Defendant offers the testimony of two experts on this issue.[4] The experts state that it is common for collective bargaining agreements to apply only to the specified facility when the companies operate more than one facility. (Stipulate R., Ex. 62, McKay Decl. at ¶3; Stipulate R., Ex. 63, Orenstein Decl. at ¶3.)

The use of the term "employer's business" in the 1994 Collective Bargaining Agreement between Plaintiff Las Vegas Sands, Inc. and Defendant Culinary Workers Union, Local 226 is not ambiguous. When the 1994 Agreement is read as a whole, the meaning of the phrase is clearly limited to the business of the Sands Hotel Casino done by Las Vegas Sands, Inc. Additionally, even if this Court determined "employer's business" was ambiguous in the 1994 Agreement, extrinsic evidence shows that the phrase should be read narrowly to include only Las Vegas Sands Inc.'s business as the Sands Hotel Casino. As a

---

[3] Plaintiff objects to the statements by Jim Bonaventure and John Wilhelm regarding the use of a clause similar to that in §22.01 by other Las Vegas hotel casinos. (Stipulated R., Ex. 47, Wilhelm Decl. at ¶1; Stipulated R., Ex. 48, Bonaventure Decl. at ¶3.) Plaintiff states that Defendant has not provided a foundation for this evidence. (Defendant's Trial Brief at Exhibit 1.) The Court sustains this objection. The statements by Bonaventure and Wilhelm on the issue of other hotel casino contracts are inadmissible.

[4] Plaintiff also objects to the expert testimony offered by the Defendant. (Stipulated R., Ex. 62, McKay Decl.; Stipulated R., Ex. 63, Orenstein Decl.) Plaintiff declares that expert testimony is barred in interpreting a contract term. (Defendant's Trial Brief at Exhibit 1.) The Court overrules this objection. Fed. R. Evid. 702.

result, the actions taken by Culinary Workers Union, Local 226 in writing letters and pamphlets against Las Vegas Sands Inc. and the Venetian did not relate to the Sands Hotel Casino and does not violate the 1994 Collective Bargaining Agreement.

III. CONCLUSION

IT IS THEREFORE ORDERED that Defendant, Culinary Workers Union, Local 226's Application for Leave to File Supplemental Brief (Doc. #48) is DENIED.

IT IS FURTHER ORDERED that Partial Judgment regarding the liability under §22.01 of the Collective Bargaining Agreement shall be entered in favor of Defendant Culinary Workers Union Local 226 and against Plaintiff Las Vegas Sands, Inc.

IT IS FURTHER ORDERED that in accord with the Stipulation and Order (#34) entered May 18, 2000, the parties shall forthwith proceed with settlement negotiations regarding the remainder of this action, and shall, not later than March 5, 2001, within which to advise the Court in writing as to whether settlement of this action has been consummated by the parties. If settlement is not consummated by March 5, 2001, the parties shall proceed to comply fully with the deadlines contained in Paragraph 3 ("TRIAL PREPARATION") of the Stipulation and Order (#34), and Paragraph 4 ("JOINT PRETRIAL ORDER").

DATED: January 16, 2001

/s/ Philip M. Pro
PHILIP M. PRO
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

PARTIAL JUDGMENT IN A CIVIL CASE

LAS VEGAS SANDS, INC.,

Plaintiff,

(Filed Jan. 18, 2001)

v.

CV-S-97-0467-PMP (RLH)

CULINARY WORKERS UNION, LOCAL 226,

Defendant.

__ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the Jury has rendered it's verdict.

X Decision by Court. This action came to be considered by the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Partial Judgment is hereby entered as to the liability of the Collective Bargaining Agreement in favor of Defendant Culinary Workers Union Local 226 and against Plaintiff Las Vegas Sands, Inc.

January 18, 2001

LANCE S. WILSON
Clerk of the Court

[SEAL]

/s/ Grace Walters
(By) Deputy Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

LAS VEGAS SANDS, INC., Plaintiff,	) CV-S-97-467-PMP (RLH)) ORDER
v.	) (Filed Apr. 13, 1999)
CULINARY WORKERS UNION #226 Defendants.	))))

Before the Court for consideration is Defendant Culinary Workers Union Local #226's Motion for Summary Judgment or for bifurcation (#8). Plaintiff Las Vegas Sands, Inc., filed a Response in opposition to Defendant's Motion for Summary Judgment (#10), to which Defendant Replied (#11).

The foregoing Motion and this case essentially remained dormant during a period of reassignment between Judges of this Court. On March 4, 1999, the case was reassigned to the undersigned for further proceedings and a hearing on Defendant's Motion for Summary Judgment was conducted on April 8, 1999. Having read and considered the foregoing, the Court finds that Defendant's Motion for Summary Judgment or for Bifurcation (#8) should be denied without prejudice to renew the same after the close of discovery in this case. with one exception. Specifically, to the extent Plaintiff's claims are based on lobbying activities by Defendant Culinary Workers Union #226, Summary Judgment is granted in favor of Defendant Culinary Workers Union and against Plaintiff Las Vegas Sands,

Inc., in accordance with the *Noerr-Pennington* doctrine. *See Kottle v. Northwest Kidney Centers*, 146 F.3d 1056 (9th Cir. 1998).

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the parties to this action shall file a Joint Discovery Plan and Scheduling Order on or before May 3, 1999.

DATED: April 13, 1999

/s/ Philip M. Pro
PHILIP M. PRO
United States District
Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAS VEGAS SANDS, INC, a Nevada Corporation, Plaintiff-Appellee, v. CULINARY WORKERS UNION LOCAL #226, an unincorporated association, Defendant-Appellant.	No. 02-16381 D.C. No. CV-97-00467-PMP ORDER (Filed Jan. 15, 2004)
LAS VEGAS SANDS, INC, a Nevada Corporation, Plaintiff-Appellant, v. CULINARY WORKERS UNION LOCAL #226, an unincorporated association, Defendant-Appellee.	No. 02-16384 D.C. No. CV-97-00467
LAS VEGAS SANDS, INC, a Nevada Corporation, Plaintiff-Appellant, v. CULINARY WORKERS UNION LOCAL #226, an unincorporated association, Defendant-Appellee.	No. 03-15125 D.C. No. CV-97-00467-PRP/RLH

Before: THOMPSON, TROTT, and CALLAHAN, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny appellant Las Vegas Sands, Inc.'s petition for rehearing. Judges Trott and Callahan have also voted to deny the petition for rehearing by the court en banc, and Judge Thompson has recommended denial of that petition.

The full court has been advised of the petition for court rehearing en banc, and no judge of the court has requested en banc rehearing. See Fed. R. App. P. 35(b).

The petitions for panel rehearing and for rehearing by the court en banc are DENIED.